In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1209

JAMES T. BENN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, during the years in suit, engaged in a large number of complicated business transactions. The Tax Court found that the complexity of these transactions was largely attributable to procedures "deliberately chosen by petitioner for the purpose, *inter alia*, of defrauding those with whom he did business * * * and also the Internal Revenue Service" (Pet. 3a). In the principal transactions here in question petitioner acquired a number of real and per-

sonal properties, usually making a small cash down-payment and giving the seller a note for most of the purchase price. Petitioner then resold these properties without delay. The question before the court was petitioner's cost basis for computing gain on the resale. After an extensive hearing the Tax Court found that petitioner took steps to impede the collection of the notes he had given in purchasing these properties and that he had no intention of ever honoring his notes (Pet. 3a-4a); petitioner does not now challenge this factual finding. Based on these facts the Tax Court concluded that petitioner's cost basis for these properties was limited to the amount he had paid for them in cash and was not increased because of the worthless notes he had given to the sellers (Pet. 3a-4a). The court of appeals affirmed *per curiam* (Pet. 1a-2a).

1. Petitioner argues that his cost basis in the properties should include not only the cash he paid for them, but also his personal notes which he never intended to pay and did not pay.[1] The Code provides that the basis of property for determining gain or loss "shall be the cost of such property." 1954 Code § 1012. This Court has commented that cost in this sense "normally means * * * cost to the taxpayer." *Detroit Edison Co.* v. *Commissioner*, 319 U.S. 98, 102, holding that the taxpayer-utility could not include in its cost basis for certain equipment amounts

[1] Petitioner states that the notes were in fact paid (Pet. 4). This statement is directly contrary to the testimony, including that of petitioner himself (R. 213-218, 223, 258-260, 316, 515-516, 813, 1245-1252, 1509-1510, 1596-1597).

which had been paid by its customers. And where taxpayers have purchased assets subject to liabilities which both parties "anticipated" would never be paid or where taxpayers have assumed, as part of a purchase, "speculative" "contingent" liabilities, the courts have refused to permit them to increase their cost basis to reflect such liabilities. *Columbus & Greenville Railway Co.* v. *Commissioner*, 42 T.C. 834, affirmed, 358 F. 2d 294 (C.A. 5), certiorari denied, 385 U.S. 827; *Albany Car Wheel Co.* v. *Commissioner*, 40 T.C. 831, affirmed *per curiam*, 333 F. 2d 653 (C.A. 2).

Similarly here, where petitioner had no intention of paying and did not pay the notes he had given for the properties, he has incurred no cost because of them and his cost basis should not be increased because of them. Thus, the lower courts correctly held that if petitioner purchased a piece of property for $35,000, paying $5,000 cash and giving his unsecured note (which he had no intention of paying) for the remaining $30,000 and resold the property for $35,000 cash, he would have a gain of $30,000.[2] Therefore, there is no need to explore in this case the ques-

[2] This result is also supported by cases like *James* v. *United States*, 366 U.S. 213 and *Rutkin* v. *United States*, 343 U.S. 130. In those cases the Court held that the proceeds of embezzlement or extortion constitute income even though the taxpayer had an unconditional obligation to make restitution. Similarly, when a taxpayer obtains a piece of property on credit—with no intent to pay for it—and immediately resells the property at a cash gain of $30,000, he has $30,000 of income, just as if he had embezzled property worth $30,000 with no intent to make restitution.

tion argued by petitioner—whether a normal taxpayer on the cash receipts and disbursements method of accounting who acquires property in exchange for a note *which he does intend to pay* can include the note in his cost basis for the property.

2. Petitioner also argues that the instant decision is inconsistent with three adjudications of the lower courts of Florida rendered in adversary proceedings between himself and various individuals. As a factual matter, however, these Florida decisions are completely irrelevant to the question before the federal courts in the instant case.

(a) *The Stonesthrow Apartments.* One of the questions before the Tax Court was the amount of petitioner's gain on sale of the Stonesthrow Apartments. He acquired this property from his ex-wife in exchange for his personal note in the amount of $37,500 (R. 2081-2082). The Tax Court found that petitioner never made any payments on this note and that he never intended to do so; thus it held that his cost basis in the Stonesthrow Apartments was zero (R. 2081-2083). Petitioner apparently argues that he paid the note by offsetting it against amounts which his ex-wife owned him and that the Tax Court was bound by the Florida decree annulling his marriage (Pet. 4-5). But regardless of whether his marriage ended by divorce or annullment, there is nothing in the record to prove that his ex-wife owed him any money which he could offset against his $37,500 note to her, and she testified at trial that she did not owe petitioner any amounts (R. 1582).

(b) *The Viglianco note.* Another question before the Tax Court was the amount of petitioner's gain on the sale of a note for $13,600 signed by one Andy Viglianco. Viglianco testified that he had borrowed $30 from petitioner and given him a note for that amount which petitioner had then raised to $13,600 without authority (R. 2077-2079). Petitioner testified that Viglianco had given him the note for $13,600 in payment of an earlier note (R. 2078). The Tax Court found that the earlier note was executed by Viglianco without any consideration from petitioner and thus that regardless of whether it accepted Viglianco's or petitioner's version, petitioner's cost in acquiring the note did not exceed $30 (R. 2069, 2079).

Petitioner argues that the Tax Court erred in not according weight to a jury verdict in a lawsuit against Viglianco by the ultimate purchaser of the note (Pet. 5-6). The jury found that the note had not been raised in amount and granted the purchaser a judgment against Viglianco for $13,600 plus costs (R. 1734-1737). This verdict is not, however, inconsistent with the Tax Court's holding that petitioner had not proved that he paid Viglianco anything more than $30 for the note.

(c) *The Dellaquila judgment.* Petitioner argues that the Tax Court erred in disallowing a claimed deduction for approximately $8,000 which he claims to have paid to one Dominick Dellaquila in satisfaction of a judgment which Dellaquila obtained against petitioner in a Florida court (Pet. 6). The Tax Court accepted the Florida judgment and denied the

deduction only because it found—contrary to petitioner's statement in the petition (Pet. 6)—that petitioner had not paid the judgment (R. 2101). There is no evidence in the record to the contrary.

The petition for certiorari should be denied.

Respectfully submitted.

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